No. 94-270

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an individual who endeavors to obstruct a grand jury proceeding by making false and misleading statements to prospective witnesses may be prosecuted for obstruction of justice, within the meaning of 18 U.S.C. 1503.

2. Whether an individual who knows of an application for authorization to intercept telephone conversations and who discloses its existence to a target in order to obstruct the interception of the target's conversations may be found guilty of violating 18 U.S.C. 2232(c), regardless of whether the authorization had expired by the time the disclosure was made.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-28a) is reported at 21 F.3d 1475. The opinion of the panel of the court of appeals (Pet. App. 29a-113a), which was subsequently vacated, is reported at 994 F.2d 609.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 19, 1994. On July 11, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 17, 1994, and the petition was filed on August 11, 1994. On November 28, 1994, the Court granted the petition. J.A. 132. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 2232(c) provides, in relevant part:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

This case arises from the prosecution of respondent United States District Judge Robert Aguilar of the Northern District of California. He was convicted after a jury trial on two counts of a multi-count indictment. One count charged respondent with obstruction of justice, in violation of 18 U.S.C. 1503. The other count charged respondent with disclosing a wiretap with the intent of obstructing or impeding it, in violation of 18 U.S.C. 2232(c). The en banc Ninth Circuit reversed the convictions on both counts. Pet. App. 1a-28a.

1. In 1986 and 1987, as part of a nationwide investigation of health care provider fraud, the San Francisco office of the Federal Bureau of Investigation (FBI) was investigating Michael Rudy Tham, a convicted former Teamster official, and Abe Chapman, an individual with longstanding criminal ties who was then under indictment. Pet. App. 3a, 5a, 6a; 7 Tr. 983, 1008. Chapman had a distant family connection with respondent; Chapman's wife's daughter had at one time been married to respondent's brother. Pet. App. 3a. On April 12, 1987, the government applied to then-Chief Judge Peckham of the United States District Court for the Northern District of California for authorization to conduct electronic surveillance of Tham's business telephones, pursuant to 18 U.S.C. 2516. The application named Chapman as an individual whose communications were to be intercepted. See 18 U.S.C. 2518(1)(b). By statute, the wiretap could run for no more than 30 days unless extended, see 18 U.S.C. 2518(5), and it expired on May 20, 1987. Pet. App. 5a. Beginning on July 15, 1987, however, Judge Peckham signed a series of orders postponing the service of

notices of the wiretap on the interceptees and maintaining the secrecy of the wiretap through April 25, 1989. 7 Tr. 918-919.

On July 9, 1987, law enforcement agents saw respondent leave the federal courthouse with Chapman. Pet. App. 3a, 5a-6a; 7 Tr. 964. On August 5, the FBI advised Judge Peckham that Chapman and respondent had been seen together. Pet. App. 6a. As Judge Peckham later testified at trial, he warned respondent four days later at an ABA reception "that in the course of a wiretap application that the name Abie Chapman had come up," that Judge Peckham had prosecuted Chapman "in a notorious narcotic case" in 1951, and that Chapman "had been a member of a sinister East Coast criminal organization and that he was convicted and sentenced to a substantial term." 7 Tr. 921. Judge Peckham testified that he spoke to respondent because he was "concerned that * * * associating with a notorious felon would create an appearance of impropriety." 7 Tr. 922. Judge Peckham "feared that Chapman might be going to use the judge's prestige of his office in the furtherance of Chapman's interest." *Ibid.*

Tham wanted to have his prior conviction for embezzlement and making false entries in union records overturned so that he could resume his union activities. After consulting with Chapman and attorney Edward Solomon, who had been a law school classmate of respondent, Tham filed a motion under 28 U.S.C. 2255 in mid-July 1987, seeking to vacate his prior conviction. Tham, Solomon, and Chapman hoped to use Chapman's and Solomon's ties to respondent to obtain help and advice from respondent with regard to the Section 2255 motion. Chapman and Solomon, who hoped to have respondent influence Judge Weigel, met with respondent and called him periodically with regard to the Section 2255 motion. Respondent checked on the scheduling of the Section 2255 motion, and asked Judge Weigel if a hearing had been set. Pet. App. 3a-4a. In a taped conversation, respondent acknowledged that he "did more than that" in connection with the case, although he stated that "[w]hat I did I did on my own." J.A. 12.

Meanwhile, the wiretap on Tham's telephones began again on September 11, 1987. Pet. App. 5a. On October 12, 1987, the wiretap once again expired, but it was reinstituted on October 22, 1987, and subsequently extended through May 8, 1988, when it finally expired. Pet. App. 5a. By October 1987, the wiretap was directed in part at investigating the apparent improper attempt by Tham and others to influence Judge Weigel, and Chapman continued to be named as an interceptee. Pet. App. 5a; Gov't Exh. 1B. On January 13, 1988, the FBI obtained authorization to expand its electronic surveillance to respondent's telephone. Gov't Exh. 1B.

The charge that respondent disclosed wiretap information arose out of the events of February 6, 1988. On that date, Chapman visited respondent at his house. As Chapman was leaving, respondent noticed a surveillance unit on the street in front of his house. Pet. App. 7a. Respondent immediately called his nephew, Steve Aguilar, and asked him to come to his house "right now, it's very, very urgent." Tape N-504. Respondent stated that "[i]t'll only take a minute, but it's very important you come here please." *Ibid.* He also told Steve that "I need to get a message to [Chapman], who was just here a minute ago. * * * But I can't talk over the phone." *Ibid.* Steve testified at trial that, upon his arrival at re-

spondent's house, respondent told him that "he recognized a car taking off following Abie [Chapman] and he recognized the driver as an FBI agent." 5 Tr. 824. Respondent also told Steve that "he had overheard at work about the possibility of Abie's phone being wiretapped." 5 Tr. 825. Steve drove to Chapman's house and informed Chapman of those facts. *Ibid.* Later that day, respondent again called Steve and asked him to come to his house. When Steve arrived, respondent asked Steve if he had seen Chapman. Steve assured respondent that he had given respondent's message to Chapman. 5 Tr. 826-827. Respondent explained to Steve that he called Steve over, rather than talking to him on the telephone, because he "didn't really know what phones were tapped." 5 Tr. 828.

Thereafter, Chapman used an alias ("Dr. Green") when he called respondent. See, *e.g.*, Tape O-1449, O-2022, O-3092. On February 29, 1988, Chapman told Tham that someone "very big" had told him that his telephone was tapped. Tape M-1189. Respondent, Chapman, Tham, and Solomon continued to discuss Tham's Section 2255 motion. In conversations with Chapman ("Dr. Green"), respondent discussed Solomon's representation of Tham. On April 20, for example, Chapman called respondent, who requested that Chapman "ask * * * Solomon to call me today." Tape O-6238. Chapman relayed the message to Tham. Tape H-6276. Using an agreed-upon code, Tham gave the message to Solomon. Tape H-6289, H-6299. As Solomon later reported back to Tham, when he called respondent, respondent dictated the language for a motion requesting a hearing on Tham's Section 2255 motion and told Solomon to file it. Tape J-4494.

By April 1988, Judge Weigel became aware of the FBI investigation in this case. On April 23, 1988, Judge Weigel recused himself from Tham's case. 9 Tr. 1236; Gov't Exh. 16. As he explained at trial, he did so because, if he denied Tham's motion, "[Tham's] lawyers could have claimed I was influenced by the FBI and their investigation." 9 Tr. 1245. On the other hand, he believed that if he granted Tham's motion, "the claim could have been made that I was influenced by Judge Aguilar, which I was not." *Ibid.*

On May 17, 1988, respondent and Solomon met for lunch. Solomon was cooperating with the government by this time and was secretly recording the conversation. J.A. 5-42. During lunch, respondent said that he "knew" the FBI was wiretapping Chapman because Judge Peckham had told him. J.A. 7. Respondent made quite clear that, in his view, Chapman's telephone was "definitely tapped." J.A. 21. Respondent admitted that he "told [his] nephew" about the tap of Chapman's telephone and that he had said to the nephew "I want you to tell him not over the phone," but to "get to his house and tell him." *Ibid.* Respondent also stated that

> once I found out that they were tapping the guy's phone the first thing I ask him, where are you calling me from? The pay phone. See I can hear the traffic. It's okay. What do you want? I wouldn't talk to him any other time. One time he called me I said where you calling me from? Marilyn's [respondent's former sister-in-law's] house. I said well I'm busy right now you'll have to call me some other time.

J.A. 27. Respondent also told Solomon to tell the authorities that "I [respondent] had nothing to do

with you regarding this case," J.A. 13, and that, if Solomon needed to call respondent at his chambers, he should "just say on, over the phone just say to me god I ran into some of our . . . our classmates" and "we oughta have lunch together." J.A. 40. Finally, respondent told Solomon that, if asked concerning his contact with Solomon, he was going to claim Solomon asked for advice about a "wrongful discharge" case, a subject that the two had in fact discussed many months before. J.A. 32. At the end of the lunch, respondent stated, "As far as I'm concerned we discussed a wrongful termination case." J.A. 42.

On May 26, 1988, respondent and Solomon met again for lunch, and Solomon once again secretly taped their conversation. J.A. 43-63. Solomon told respondent that FBI agents had interviewed him and informed him that "there's a grand jury goin' on now," that they had "subpoenaed [Solomon's] toll calls," and that Solomon would be subpoenaed to appear as a witness. J.A. 47. During the conversation, respondent stated that "if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel. It depends on what Judge Weigel says." J.A. 51. When Solomon told respondent that "[i]f anything develops I'll try to get in touch with you," respondent instructed, "Always call me by pay phone." J.A. 62.

The obstruction of justice count arises from a secretly recorded interview with respondent conducted on June 22, 1988, by Agent Carlon and another agent of the FBI. J.A. 64-95. The two agents visited respondent and informed respondent that there had been an allegation that, at Chapman's request, respondent had "attempted to intervene" in Tham's Section 2255 motion. J.A. 68.

Respondent made a number of false statements to the agents. For example, respondent stated that he had found out "recently" that Solomon was Tham's lawyer. J.A. 73. He stated that he "simply didn't discuss" the Tham case with Solomon, J.A. 76, even when the two had had lunch together. J.A. 74. See also J.A. 81 ("I never discussed it with Solomon"). He said that Solomon had asked him "how to proceed on a um wrongful termination or employment discrimination" case. J.A. 78.

Agent Carlon informed respondent that Chapman had been observed leaving his house to make calls from a pay telephone and then immediately returning home. Carlon stated his view that Chapman was acting like those who "suspect perhaps that their phones are tapped." J.A. 83. Respondent replied, "Well he can't have learned that from me because I don't . . . I don't know anything about that." *Ibid.* Respondent also denied that he had "ever f[ou]nd out or learn[ed] of any wire tap order on Abe Chapman." J.A. 84. See also J.A. 86. At the conclusion of the interview, respondent returned to the subject of his conversations with Chapman and stated:

> As you can see my conversations with him aren't very long, you know, and my and my visits with him aren't very long. He'll call me and say well I saw your mother and father and they're fine goodbye.

J.A. 94. At that point, the transcript indicates "(laughter)," followed immediately by respondent's adding: "And that's it." *Ibid.*

Early in the interview, respondent asked whether he was "some kind of a target" of the investigation and stated that he "assume[d] from this * * * that

I very likely am if I've done anything wrong." J.A. 68. Agent Carlon responded, "Yeah." *Ibid.* Later, respondent asked again if he was "the target." J.A. 86. Agent Carlon stated that "certainly some of this evidence is pointing in your direction and I'd have to say yes * * * there is a Grand Jury meeting" and that "some evidence will be heard I'm . . . I'm sure on this issue." *Ibid.* Respondent again said that he was "concerned" that a grand jury would meet "to determine whether or not they should return some indictment * * * against me for obstructing justice." J.A. 88.

2. On June 13, 1989, an eight-count indictment was returned against respondent, Tham, and Chapman. J.A. 96-107. Respondent was charged with conspiring to defraud the United States and to endeavor to obstruct justice, in violation of 18 U.S.C. 371; four counts of endeavoring to obstruct justice, in violation of 18 U.S.C. 1503; two counts of illegally disclosing a wiretap application, in violation of 18 U.S.C. 2232(c); and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). On March 19, 1990, a jury acquitted respondent on one count of obstructing justice and deadlocked on the remaining counts against respondent and the other defendants. Pet. App. 4a, 30a.

The cases were severed, and the trial court granted the government's motion to dismiss the RICO count and one of the obstruction of justice counts against respondent. After a retrial, respondent was found guilty on one count of obstruction of justice and one count of illegally disclosing a wiretap application.

He was acquitted on the four remaining counts. Respondent was sentenced to concurrent sentences of six months' imprisonment and ordered to pay a $2,000 fine. See Pet. App. 4a, 30a, 106a. Meanwhile, Tham was convicted in a separate trial on one count of conspiracy and one count of obstruction of justice. See *United States* v. *Tham*, 960 F.2d 1391 (9th Cir. 1991). Chapman pleaded guilty to the conspiracy charge. See *id.* at 1393 n.1.

3. A divided panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 29a-113a. The result hinged on the adequacy and effect of the knowledge instruction given to the jury, which was derived from the Model Penal Code's definition of knowledge. Judge Hall found that knowledge instruction correct, and would have affirmed the convictions on both counts. *Id.* at 31a-57a. Judge Hug believed that the knowledge instruction was incorrect, that the error was not harmless as to either count, and that both counts were defective for other reasons as well. He would therefore have reversed the convictions on both counts. *Id.* at 65a-101a. Judge O'Scannlain agreed with Judge Hug that the knowledge instruction was incorrect, but he viewed that error to be harmless as to the wiretap disclosure count. *Id.* at 102a-113a. Accordingly, the panel affirmed respondent's conviction on the wiretap disclosure count and reversed his conviction on the obstruction of justice count. *Id.* at 30a.

On the government's appeal of respondent's sentence, the panel remanded the case to the district court for resentencing, holding that the district court had failed to provide a reasoned explanation for its downward departure at sentencing. Pet. App. 30a-31a, 65a & n.1, 106a-112a.

4. On rehearing en banc, the Ninth Circuit reversed respondent's convictions on both counts. Pet. App. 1a-28a. The court did not reach the question whether the knowledge instruction was adequate or, if not, whether giving that instruction was harmless error.

With respect to the obstruction of justice count, the court observed that this prosecution was brought under the so-called "omnibus clause" of Section 1503, which makes it an offense to endeavor to "corruptly or by threats or force, or by any threatening letter or communication, * * * influence, obstruct, or impede[] the due administration of justice." 18 U.S.C. 1503. The court held that "the conduct charged in the indictment and found by the jury does not constitute a violation of" that clause. Pet. App. 16a. In the court's view, Congress had implicitly narrowed the broad language of the omnibus clause when it enacted and later amended another statute, 18 U.S.C. 1512. Pet. App. 19a-22a.

Specifically, the court observed that attempts to obstruct justice by influencing a witness were originally covered by Section 1503. Pet. App. 19a. In 1982, Congress had removed all express references to witnesses from Section 1503 when it enacted Section 1512, a new offense directed toward tampering with or influencing witnesses. Then, in 1988, Congress had amended Section 1512 in turn to make clear that it extended not only to coercion of witnesses, but also to non-coercive witness tampering, in which the defendant "corruptly persuades [a witness] * * * or attempts to do so." 18 U.S.C. 1512(b). The court acknowledged that the 1988 amendment did not alter Section 1503 and that it was enacted five months after the conduct at issue here. Pet. App. 21a. But

the court held that the 1988 amendment nonetheless "indicates that the conduct [claimed to be in violation of Section 1503] must involve a defendant who 'corruptly persuades . . . or attempts to [persuade]' a witness so as to influence his testimony." *Id.* at 22a. Since respondent was charged with obstructing the grand jury's investigation by making false and misleading statements to the FBI agents, and not by attempting to "corruptly persuade" them to testify falsely before the grand jury, the court concluded that no Section 1503 offense had been charged or proven in this case. *Id.* at 22a-24a. The court also found support for its conclusion in the rule of lenity, and in the Fifth Amendment concerns that would in its view result from "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." *Id.* at 24a.

With respect to the wiretap disclosure count, the court held that the statute under which respondent was charged, 18 U.S.C. 2232(c), does not prohibit disclosure of wiretaps if the authorization of which the defendant had knowledge had expired by the time the defendant made the disclosure. In the court's view, a defendant could not have made a disclosure with the intent to interfere with "such interception"—*i.e.*, the interception contemplated in the wiretap application of which he had knowledge—if the interception had in fact expired before he had made the disclosure. Pet. App. 9a. Although the court believed that interference with possible interception could result from disclosure of a pending wiretap application or from disclosure of a still-active authorization, the court stated that "disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere

with 'such interception.'" *Ibid.* In reaching that conclusion, the court added that its analysis of the statute was supported once again by the rule of lenity, *id.* at 9a-10a, and by the "substantial" impact on First Amendment interests that it believed could result from reading the statute to "bar[] disclosure of a wiretap application many months or years after the fact," *id.* at 11a.

Judge Fernandez, joined by Chief Judge Wallace, dissented from the court's reversal of the conviction on the wiretap disclosure count. Pet. App. 25a-28a. In Judge Fernandez's view, the plain language of the statute requires the government to prove only "that [respondent] knew that a wiretap had been applied for; that [respondent] intended to obstruct or impede the interception for which the application was designed to obtain authorization; and that [respondent] gave or attempted to give notice of the possible interception." *Id.* at 25a. Judge Fernandez explained that, because the evidence was more than adequate to prove those three elements, respondent's conviction under Section 2232(c) should be affirmed. In Judge Fernandez's view, so long as respondent "attempt[ed] to give a notice that would interfere with a wiretap," the fact that the wiretap of which he had notice had in fact expired was of no relevance. *Id.* at 26a.

SUMMARY OF ARGUMENT

The obstruction of justice offense defined by the omnibus clause of Section 1503 requires proof that there was a pending proceeding, that the defendant had knowledge of that proceeding, and that the defendant "corruptly * * * endeavor[ed] to influence, obstruct, or impede[] the due administration of justice" in that proceeding. The evidence at trial supported the jury's findings that, when respondent lied to the FBI agents, there was a pending grand jury proceeding and respondent knew of that proceeding. The evidence also was sufficient to show that respondent made a series of false statements to the FBI agents with the intent that they be reported to the grand jury and obstruct its investigation. Under the plain meaning of the omnibus clause of Section 1503, that conduct constituted a corrupt endeavor to obstruct justice. Accordingly, respondent was properly convicted of violating Section 1503.

The court of appeals erred in limiting the scope of the omnibus clause of Section 1503 on the ground that some of its protections are duplicated in 18 U.S.C. 1512, a statute protecting against witness tampering. Congress did not alter or amend the omnibus clause of Section 1503 when it enacted Section 1512 in 1982 or when it amended Section 1512 in 1988. Although the 1982 legislation did remove the express references to witnesses from other clauses in Section 1503, the effect of doing so was simply to remove specific language in Section 1503 that became redundant with the enactment of the new statute. And the 1988 legislation on which the court of appeals relied in construing the omnibus clause did not change Section 1503 at all. There is no reason to believe that Congress intended to alter the applicability of the omnibus clause of Section 1503 in accordance with its terms.

The court of appeals also erred in reversing respondent's conviction for wiretap disclosure under 18 U.S.C. 2232(c). The text of that statute requires proof that a defendant knew of an application to intercept conversations, intended to obstruct such interception, and attempted to give notice of the possible interception. There is no basis for the court of

appeals' holding that a defendant charged with violating Section 2232(c) may not be convicted if, unbeknownst to him, the interception of communications had not been authorized or the authorization had expired by the time he made his disclosure. The statutory language requires that the defendant intend to obstruct the interception; it does not require that the interception actually be occurring at the time of the disclosure. And the statute's requirement that the defendant give notice of the "possible interception" specifically recognizes that the government need not prove that the interception was actually occurring at the time of disclosure in order to obtain a conviction. If, after acquiring knowledge of the application to intercept communications, the defendant discloses the possibility of interception to others, he has violated the statute.

ARGUMENT

I. SECTION 1503 PROHIBITS MAKING FALSE AND MISLEADING STATEMENTS TO A POTENTIAL GRAND JURY WITNESS WITH THE INTENT OF OBSTRUCTING A GRAND JURY PROCEEDING

The "omnibus clause" of 18 U.S.C. 1503 makes it a crime to

> corruptly or by threats or force, or by any threatening letter or communication, influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice.

A violation of that clause requires proof of the following elements: "(1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due

administration of justice." *United States* v. *Williams*, 874 F.2d 968, 977 (5th Cir. 1989); see also *United States* v. *Barfield*, 999 F.2d 1520 (11th Cir. 1993); *United States* v. *Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Among the proceedings protected by the statute are grand jury proceedings. See, *e.g.*, *United States* v. *Capo*, 791 F.2d 1054, 1070 (1986), vacated in part on other grounds on reh'g en banc, 817 F.2d 947 (2d Cir. 1987); *United States* v. *Simmons*, 591 F.2d 206, 208 (3d Cir. 1979); *United States* v. *Howard*, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

Viewed in the light most favorable to the government (as the verdicts of guilty require), the evidence in this case was ample to support the jury's finding that each of those elements was established. And, contrary to the court of appeals' holding, there is no basis for concluding that respondent did not obstruct justice because his misconduct involved making false statements to prospective grand jury witnesses.

A. The Evidence At Trial Established The Elements Of An Obstruction Of Justice

At the time of respondent's interview with the FBI agents on June 22, 1988, it is undisputed that there was a pending grand jury proceeding. There likewise can be no serious dispute that respondent had knowledge of the pending grand jury proceeding. In the tape-recorded conversation with Solomon on May 26, 1988—a month before the June 22 interview with the FBI agents on which the obstruction of justice count was based—Solomon informed respondent that "there's a grand jury goin' on now," that the FBI agents had informed him that they had "subpoenaed [Solomon's] toll calls," and that Solomon had been told he would be subpoenaed to appear as a witness.

J.A. 47. In that same conversation, respondent made clear that he understood that there was an ongoing grand jury investigation. He stated that

> if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel. It depends on what Judge Weigel says.

J.A. 51. In addition, at the beginning of the June 22 interview, the FBI agents informed respondent that he was a "target" of the investigation, J.A. 68, and respondent voiced concern to FBI Agent Carlon that he would be indicted "for obstructing justice," J.A. 88.

The evidence also supported the jury's conclusion that respondent acted "corruptly" with intent to "obstruct * * * the due administration of justice." 18 U.S.C. 1503. Respondent made false statements to FBI agents to minimize his involvement in a matter under grand jury investigation. He understood that his false statements would be provided to the grand jury, J.A. 86-88, and he made those statements with the intent to thwart the grand jury investigation.[1] The evidence showed that respondent's false statements—including his statement that he had no knowledge concerning the Chapman wire tap, his denial of knowledge concerning the relationship between Solomon and Tham, his statement that he did not discuss

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[1] The jury was specifically instructed that "[t]he thrust of this count is not that [respondent] lied to the FBI because that's not a violation of a particular law we're concerned with here." J.A. 126-127. Instead, the jury was instructed that the issue in this case was whether respondent "endeavored in those interviews, whether the FBI people or not, to in some way impede, interfere with or obstruct the functioning of that grand jury." J.A. 127.

the Tham case with Solomon, and his "cover story" that he and Solomon had simply talked about a wrongful termination case—were made with intent to mislead the grand jury and avoid testifying himself before the grand jury. See pp. 8-10, *supra*. That course of action constituted "corrupt" conduct under Section 1503, and the evidence showed that respondent performed it with the intent to obstruct a grand jury proceeding. See *United States* v. *Grubb*, 11 F.3d 426, 437 (4th Cir. 1993) (omnibus clause applies as long as the person who lied to a potential grand jury witness knew of the pending grand jury proceeding and "acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding").

Courts have long recognized that closely analogous action to mislead the grand jury constitutes "corrupt" conduct, in violation of the omnibus clause of Section 1503. For example, the courts of appeals have uniformly recognized that obstruction of justice, in violation of the omnibus clause of Section 1503, may be committed by submitting false, forged, or altered documents to a grand jury. See, *e.g.*, *United States* v. *Rankin*, 870 F.2d 109, 112 (3d Cir. 1989); *United States* v. *Nelson*, 852 F.2d 706, 711-712 (3d Cir.), cert. denied, 488 U.S. 909 (1988); *United States* v. *McComb*, 744 F.2d 555, 559 (7th Cir. 1984); *United States* v. *Faudman*, 640 F.2d 20, 23 (6th Cir. 1981); *United States* v. *Walasek*, 527 F.2d 676, 679-680 (3d Cir. 1975). Obstruction of justice may also occur even when the false documents had not been subpoenaed by the grand jury and were not produced directly to the grand jury. For example, in *United States* v. *Shoup*, 608 F.2d 950, 959-963 (3d Cir. 1979), the defendant submitted a misleading report to the United States Attorney, knowing that the con-

tents of that report would be given to a sitting grand jury. *Id.* at 962. The Third Circuit affirmed the conviction, rejecting the defendant's argument that he could not have violated Section 1503 "because his report was requested by the United States Attorney, not the grand jury." *Ibid.* Because the defendant "knew that his report would likely be submitted to the grand jury and that he would be called to testify about his findings," *ibid.*, the court affirmed his conviction. And, as respondent has conceded, "the courts have routinely applied Section 1503 to false testimony to the grand jury." Br. in Opp. 19.[2]

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[2] The majority of the courts of appeals that have addressed the issue have so held. *E.g., United States* v. *Grubb*, 11 F.3d 426, 436-437 (4th Cir. 1993); *United States* v. *Williams*, 874 F.2d 968, 976-982 (5th Cir. 1989); *United States* v. *Gonzalez-Mares*, 752 F.2d 1485, 1491-1492 (9th Cir.), cert. denied, 473 U.S. 913 (1985); *United States* v. *Walasek*, 527 F.2d 676, 679-681 (3d Cir. 1975); *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); cf. *United States* v. *Lavelle*, 751 F.2d 1266, 1270 (D.C. Cir.) (defendant caused false and misleading statement to be submitted to agency, in violation of 18 U.S.C. 1505, the administrative counterpart to Section 1503), cert. denied, 474 U.S. 817 (1985). But see *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969) (false statements in affidavit filed with district court not covered by omnibus clause of Section 1503).

The same principles have also been applied outside the grand jury context. See, *e.g., United States* v. *Barber*, 881 F.2d 345, 351 (7th Cir. 1989) (submission of forged letters to judge to influence sentencing of a defendant in another case), cert. denied, 495 U.S. 922 (1990); *United States* v. *Barfield*, 999 F.2d at 1522, 1524 (confidential informant provided false information to attorney for defendant, so that informant's own testimony would be impeached and defendant would not be convicted).

Respondent's conduct had the same effect as the submission of false or misleading documents or testimony to a grand jury. The only distinction between the misconduct in those cases and respondent's misconduct is that respondent's particular method of obstructing justice was to make false oral statements to FBI agents whom, he knew, would report those statements to the grand jury. Cf. *Costello* v. *United States*, 350 U.S. 359 (1956) (grand jury may return valid indictment based solely on hearsay testimony of FBI agents). But a defendant can as readily obstruct justice through the medium of false statements to witnesses as through the medium of false documents or testimony, and both of those forms of misconduct violate the omnibus clause of Section 1503. In short, the jury's finding that respondent made his false statements with the intent to obstruct the grand jury proceedings was supported by the evidence, and all of the elements of a violation of the omnibus clause of Section 1503 were made out.

B. The Omnibus Clause Of Section 1503 Applies To Misleading Statements Made To A Potential Grand Jury Witness

In overturning respondent's conviction for obstruction of justice, the court of appeals held that a special requirement exists under Section 1503 for cases involving potential grand jury witnesses. When the defendant is charged with endeavoring to obstruct a grand jury investigation by conduct directed toward a prospective grand jury witness, the court held, the conduct may be prosecuted under the omnibus clause of Section 1503 only if it can be characterized as an attempt to "corruptly persuade[]" the witness. Pet. App. 22a, 24a. In the court's view, although "threats, force, bribery, [or] extortion" would satisfy that re-

quirement, *id.* at 23, "making a false statement to a potential witness" would not, *id.* at 22a. Applying that requirement to the facts of this case, the court found that respondent's endeavor to obstruct the grand jury was not prohibited by the omnibus clause of Section 1503.

The court of appeals' conclusion is erroneous. In narrowing the scope of the omnibus clause with respect to witness-related misconduct, the court of appeals took note of the enactment in 1982 of a separate statute specifically addressed to witness tampering, 18 U.S.C. 1512, and then relied heavily on the amendment of Section 1512 in 1988. But the fact remains that, throughout the entire period, the portion of Section 1503 under which respondent was charged—the omnibus clause—remained unchanged. A natural reading of the text of that clause, both before and after the enactment of Section 1512, is that it prohibits all forms of conduct intended to mislead or obstruct the grand jury, including making false statements to potential witnesses with the intent that those statements be reported to a grand jury to thwart its investigation. Neither the 1982 enactment of Section 1512 nor the 1988 amendment to Section 1512 provides any basis for altering that conclusion.

1. *The scope of the omnibus clause was not affected by the 1982 amendments.* Section 1503 has always contained an omnibus clause; in addition, the original version of Section 1503 included two specific references to witnesses. The first primarily addressed efforts to influence or affect witnesses before their testimony, while the second primarily addressed injuring witnesses because of testimony already given. See 18 U.S.C. 1503 (1976) (quoted at Pet. App. 19a n.5). In 1982, Congress enacted the Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291,

§ 4(a), 96 Stat. 1249-1253, which included provisions that duplicated the references to witnesses in Section 1503. To eliminate that duplication, Congress removed the specific references to witnesses from Section 1503. VWPA § 4(c), 96 Stat. 1253. Those deletions "left untouched" the omnibus clause of Section 1503 that is at issue here. *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), cert. denied, 113 S. Ct. 1348 (1993).

a. Before the 1982 amendments, the introductory clause of Section 1503 proscribed endeavors "corruptly, or by threats or force, or by any threatening letter or communication, * * * to influence, intimidate, or impede any witness" in a federal court proceeding. 18 U.S.C. 1503 (1976). In 1982, the VWPA added a new provision to federal law, codified at 18 U.S.C. 1512, to address witness tampering. § 4(a), 96 Stat. 1249-1250. The new provision proscribed "knowingly us[ing] intimidation or physical force, or threaten-[ing] another person, or attempt[ing] to do so, or engag[ing] in misleading conduct" with intent to "influence * * * testimony" or "cause * * * any person to" withhold or alter testimony or documents, evade legal process, or communicate information regarding a federal crime to law enforcement officers or federal courts. 96 Stat. 1249.

Section 1512(b) differed in several specific respects from the clause of Section 1503 it replaced. For example, Section 1503 requires a pending federal proceeding. See, *e.g.*, *United States* v. *Williams*, 874 F.2d 968, 977 (5th Cir. 1989). The new provision, however, applied if the witness was anticipated to testify at an "official proceeding," which "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(e)(1). The new Section 1512 also applied regardless of whether the defendant

knew that the official proceeding was federal in character, rather than state or local. 18 U.S.C. 1512(f). Section 1512 was narrower in one important respect. Perhaps unwittingly, Congress neglected to include in it a prohibition of attempts to bribe or otherwise corruptly persuade a witness. The significance of that omission became the subject of debate in the courts of appeals. See pp. 28-29, *infra*. But whether or not that omission was intended, the scope of the new provision at least substantially overlapped that of the clause it replaced in Section 1503. Accordingly, Congress in the VWPA deleted the specific proscription in Section 1503.

Before the enactment of the VWPA, Section 1503 also included one other specific reference to witnesses: it proscribed "injur[ing] any * * * witness * * * on account of his attending * * * or on account of his testifying" in a federal court. 18 U.S.C. 1503 (1976). At the same time as Congress enacted Section 1512, it also enacted 18 U.S.C. 1513. VWPA § 4(a), 96 Stat. 1250. That provision proscribes, *inter alia*, "caus[ing] bodily injury to another person * * * or threaten[ing] to do so, with intent to retaliate against any person for * * * the attendance of a witness * * * at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding." 18 U.S.C. 1513(a)(1). As with Section 1512, Section 1513 substantially overlapped the clause in Section 1503 that it replaced. Accordingly, Congress deleted the specific prohibition on injuring a witness from Section 1503.

b. Because the VWPA did not alter the scope of the omnibus clause of Section 1503, misconduct that violated that clause before 1982 continued to be within its scope after the 1982 enactments. The broad

prohibition against "corruptly * * * endeavor[ing] to influence, obstruct, or impede[] the due administration of justice" in the omnibus clause of Section 1503 remained the primary source of protection in federal law against obstruction of justice.

It is true that some conduct that violates Section 1503 would also violate the new prohibitions in Section 1512 or Section 1513. But it is a familiar principle in the criminal law that the same conduct may constitute an offense under two distinct statutes, and that in such a situation the government has the option to proceed under either one. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-126 (1979) (citing cases); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952). There is therefore no reason to assume that Congress made an implicit decision in the VWPA to eliminate any possible overlap between the omnibus clause of Section 1503 and the new provisions specifically directed at witness-related offenses. Indeed, even the court of appeals in this case did not adopt the theory that Sections 1503 and 1512 are mutually exclusive. Pet. App. 22a. And any holding that the two statutes are mutually exclusive would place prosecutors in the difficult position of having to elect in advance between two provisions that both apparently apply to a particular course of conduct, with the risk that a reviewing court might later conclude that the wrong statute had been invoked. Absent express language requiring that result, an intention to impose that burden on the criminal justice system should not be attributed to Congress.

Nor is there any reason to attribute an intent to Congress to remove *all* misconduct involving witnesses from the scope of Section 1503. Because Congress did not alter the text of the omnibus clause in any respect when it enacted the VWPA in 1982, the

conclusion that its substantive scope had changed would require a finding that the omnibus clause had been partially repealed by implication. As this Court has frequently explained, however, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); see, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). When a new statute overlaps a portion of an older one, any legislative intent to repeal the earlier statute must be manifest in a "positive repugnancy between the provisions," *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939), for "it is not enough to show that the two statutes produce differing results when applied to the same factual situation." *United States* v. *Batchelder*, 442 U.S. at 122 (internal quotation marks omitted).

This case does not justify the invocation of either of the two exceptions to the rule severely disfavoring implied repeals—where there is "irreconcilable conflict" between the two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute." *Randall*, 478 U.S. at 661. There is no "conflict" or "positive repugnancy" between Section 1512 and the omnibus clause of Section 1503; both statutes define distinct criminal offenses, and, by refraining from committing both offenses, individuals may easily comply with both. Nor does Section 1512 cover "the whole situation" of the omnibus clause of Section 1503. Indeed, each statute prohibits substantial conduct that is not prohibited by the other.

The court of appeals indicated some reluctance to interpret the omnibus clause to prohibit a defendant

from making false statements to a potential grand jury witness, because that conduct "is very different from the other types of activities enumerated in section 1503." Pet. App. 23a. The omnibus clause, however, stands as an additional broad prohibition against obstructions of justice, and its purpose is to prohibit "more imaginative forms of criminal behavior * * * that defy enumeration." *United States* v. *Lester*, 749 F.2d 1288, 1294 (9th Cir. 1984). That role of the omnibus clause would be frustrated by limiting it to the specifically defined offenses in other clauses of Section 1503.

c. In *United States* v. *Noveck*, 273 U.S. 202 (1927), this Court rejected reasoning that closely paralleled the holding of the court of appeals here. The court of appeals in that case had held that a statute prohibiting anyone from "willfully attempt-[ing] in any manner to defeat or evade" an income tax impliedly repealed the general perjury statute, insofar as that statute applied to perjurious statements on a tax return. This Court reversed. The Court noted that there "was confessedly no express repeal" and that "it is clear that the two sections are not inconsistent." *Id.* at 206. Because the two offenses "are entirely distinct in point of law, even when they arise out of the same transaction or act," the Court found that the conclusion that "Congress must have intended" an implied repeal "does not follow." *Ibid.* The Court applied the same analysis in *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), in rejecting a claim that the enactment of a prohibition against "the fraudulent sale of securities by mail" in the Securities Act of 1933 "repeals by implication the provisions of the old mail fraud statute in so far as they cover securities." See also *United*

States v. *Hirsch*, 100 U.S. 33, 35 (1879). That analysis leads to the same conclusion here.

All but one of the courts of appeals that have addressed the question have held that the enactment of Sections 1512 and 1513 did not alter the scope of the omnibus clause of Section 1503. For example, in *United States* v. *Kenny*, 973 F.2d 339 (4th Cir. 1992), the court affirmed a conviction under Section 1503 for a witness-related offense, even though the same conduct could have been prosecuted under Section 1512. The court held that "[t]he fact that § 1512 more specifically addresses improper conduct involving a witness does not preclude application of § 1503." 973 F.2d at 342. Other courts have also concluded that Section 1512 "is not the exclusive vehicle for prosecution for witness tampering," and that Section 1503 "is broad enough to cover such proscribed acts against witnesses." *United States* v. *Moody*, 977 F.2d at 1424. See *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985) ("it is entirely proper to charge defendants under § 1503 with interfering with the due administration of justice when the conduct of the defendant relates to tampering with a witness"), cert. denied, 474 U.S. 1076 and 476 U.S. 1106 (1986); *United States* v. *Wesley*, 748 F.2d 962, 965 (5th Cir. 1984) (relying on "clear" terms of Section 1503 to affirm convictions under both Section 1503 and Section 1512 for intimidating a witness), cert. denied, 471 U.S. 1130 (1985); *United States* v. *Marrapese*, 826 F.2d 145, 148 (1st Cir.), cert. denied, 484 U.S. 944 (1987).

In *United States* v. *Risken*, 788 F.2d 1361, 1369 (8th Cir.), cert. denied, 479 U.S. 923 (1986), the court applied that principle in circumstances quite similar to this case, affirming convictions under both Section 1503 and Section 1512 because the defendant's "engaging in misleading conduct toward [a] grand jury witness * * * fall[s] within the terms of [both statutes]." Indeed, before this case, even the Ninth Circuit appeared to recognize that Congress's removal of the specific references to witnesses in Section 1503 did not preclude the prosecution of at least some witness-tampering offenses under the omnibus clause of Section 1503. See *United States* v. *Lester*, 749 F.2d at 1295-1296; see also *United States* v. *Kulczyk*, 931 F.2d 542, 546 & n.6 (9th Cir. 1991).[3]

d. The legislative history of the VWPA provides no support for truncating the scope of the omnibus clause of Section 1503. As reported by the Senate committee, the bill that evolved into the VWPA included an omnibus clause in Section 1512 that essentially tracked the omnibus clause of Section 1503 and that was not specifically tied to witness protection. S. Rep. No. 532, 97th Cong., 2d Sess. 3 (1982) (quoting bill).[4] The "use of a broad residual clause" was

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[3] Only the Second Circuit has held that, in light of the enactment of Section 1512, witness-related offenses may not be prosecuted under the omnibus clause of Section 1503. See *United States* v. *Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984) (threat to kill a witness); *United States* v. *Jackson*, 805 F.2d 457, 461 (2d Cir. 1986) (dictum), cert. denied, 480 U.S. 922 (1987); see also *United States* v. *Masterpol*, 940 F.2d 760, 762-763 (2d Cir. 1991). The Second Circuit concluded that Congress's 1982 removal of the specific references to witnesses in Section 1503, coupled with a statement of a Senator in floor debate on the bill, leads to the conclusion that the legislature "affirmatively intended to remove witnesses entirely from the scope of § 1503." *Hernandez*, 730 F.2d at 898. For the reasons discussed in this brief, the Second Circuit's reasoning is unsound.

[4] The Senate bill would have made it a crime to

> with intent corruptly, or by threats of force, or by any threatening letter or communication, influence[],

intended "to carry forward the basic coverage" of Section 1503, because "the purpose of preventing an obstruction or miscarriage of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses." S. Rep. No. 532, *supra*, at 18. The bill would not have amended Section 1503 at all: both the omnibus clause and the specific references to witnesses were left intact.

When the bill was sent to the House, it substituted its own version, which did not include the omnibus clause in Section 1512 and which did amend Section 1503 to eliminate the explicit references to witnesses. See 128 Cong. Rec. 26,357, 26,358 (1982). There was no committee report on the House bill. The Senate then further amended the bill, leaving intact the basic structure of the House bill, including the omission of the omnibus clause in Section 1512 and the elimination of the specific clauses referring to witnesses in Section 1503. See 128 Cong. Rec. 27,391 (1982) (discussing changes Senate made to this portion of the bill). During the floor debate, Senator Heinz, one of the initiators and primary backers of the legislation, made two relevant statements concerning the differences between the House and Senate versions of the bill.

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obstruct[], impede[], or attempt[] to corruptly, or by threats of force, or by threatening letter or communications, influence[], obstruct[], [or] impede[] the—

(A) enforcement and prosecution of federal law;

(B) administration of a law under which an official proceeding is being or may be conducted; or

(C) exercise of a Federal legislative power of inquiry.

S. Rep. No. 532, *supra*, 2-3.

First, Senator Heinz addressed the omnibus clause. He explained that the omnibus clause in the Senate-passed Section 1512 "was taken out of the bill as beyond the legitimate scope of this witness protection measure" and because it "also is probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. 26,810 (1982). The "duplicative" obstruction statutes to which he referred were Section 1503 and its administrative analogue, 18 U.S.C. 1505. Far from demonstrating an intent to eliminate all witness-related provisions from Section 1503, Senator Heinz thus relied on the continued applicability of Section 1503 as the basis for removing what would have been "duplicative" coverage in Section 1512.

Second, Senator Heinz stated that

> 18 U.S.C. 1503 already provides some witness protections—but only as to witnesses under subpena in active cases. The Senate passed bill allowed a slight overlap between old section 1503 and new sections 1512 and 1513. The House version amends section 1503 so it will make no mention of, and provide no protection to, su[b]penaed witnesses. The compromise accepts the House position. By amending section 1503 in this way, the proposal will contribute to a clearer and less duplicative law.

128 Cong. Rec. 26,810 (1982). That statement did not mean that the omnibus clause of Section 1503 no longer applied to witness-related offenses. Taken in context, the statement explained the removal of the specific references to witnesses from Section 1503. In light of the enactment of Sections 1512 and 1513, Congress believed those references to be duplicative. The desire to eliminate that specific duplication, how-

ever, does not suggest that Congress intended to remove all witness-related offenses from the scope of Section 1503, or to limit in some other way the scope of the omnibus clause of Section 1503. Indeed, as Senator Heinz's earlier statements made clear, he was relying on the continued protection of the omnibus clause to justify the omission of a virtually identical clause from Section 1512.

2. *The omnibus clause was not narrowed by the 1988 amendment to Section 1512.* In finding that Section 1503 did not embrace false statements to a grand jury witness, the court of appeals did not rely principally on the provisions enacted by the VWPA in 1982; rather, the court put its principal reliance on an amendment to Section 1512 that Congress enacted in 1988.[5] As originally enacted, Section 1512 did not expressly prohibit bribery or similar uses of non-coercive means to persuade a witness to withhold testimony or testify falsely. In November 1988, Congress remedied that defect by adding the words "or corruptly persuades" to Section 1512(b). Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7029(c), 102 Stat. 4398. See Pet. App. 21a. According to the court of appeals, the "importance" of the amendment is that by enacting it "Congress indicated what type of non-coercive conduct was meant to be proscribed with regard to witnesses." *Id.* at 21a-22a. In the court's view, the 1988 amendment does not merely establish

[5] In 1986, Section 1512 had been amended to add what is now designated 18 U.S.C. 1512(a), which makes it a federal offense to kill or attempt to kill any person with intent to prevent the appearance of a witness, the production of evidence, or the communication of information relating to criminal offenses. Pub. L. No. 99-646, § 61, 100 Stat. 3614. That provision has no bearing on the issues in this case.

what kind of non-coercive conduct toward witnesses is prohibited by Section 1512; it also should be used "as a guide to interpreting the pre-amendment section 1503." *Id.* at 24a.

The court of appeals was mistaken. Initially, as the court itself acknowledged, the 1988 amendment to Section 1512 was enacted "approximately five months after the conduct forming the basis for the charge against [respondent] occurred." Pet. App. 21a. The amendment accordingly could have had no effect on Section 1503 (or, for that matter, Section 1512), as applied in this case. In addition, a dramatic leap of logic is required to conclude that Congress's intent to amend Section 1512 to prohibit certain conduct has any bearing on the proper interpretation of Section 1503, which the 1988 legislation left entirely untouched. See *United States* v. *Kenny*, 973 F.2d at 343 ("[T]he 1988 amendment does not change the plain language of the omnibus clause of 18 U.S.C. § 1503 and does not, therefore, preclude its general application to acts that obstruct justice."). Finally, the 1988 amendment did not in any way address the conduct at issue in this case. Respondent was not charged with "corrupt *persuasion*" of the FBI agents; he was instead charged with lying to the FBI agents with the intent that the false information he provided would in turn be furnished to the grand jury and would obstruct its investigation. Even if it could be inferred that Congress in 1988 intended that cases involving "corrupt persuasion" be prosecuted only under Section 1512 and not under the omnibus clause of Section 1503 (and for the reasons given above, no such inference should be drawn), there would be no basis for the further inference that Congress intended in 1988 to remove

cases that did *not* involve "corrupt persuasion" from the scope of the omnibus clause of Section 1503.

The court of appeals' reliance on the 1988 amendment of Section 1512 "as a guide to interpreting the pre-amendment section 1503," Pet. App. 24a, is particularly misplaced because the language of the two provisions is significantly different. The omnibus clause of Section 1503 has no direct counterpart to the phrase "or corruptly persuades" that Congress added to Section 1512 in 1988. The omnibus clause uses the all-embracing formulation "or corruptly * * * endeavors to influence, obstruct, or impede[] the due administration of justice." That difference in language strongly undercuts the court of appeals' determination to accord the same scope to the two formulations. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Respondent has argued (Br. in Opp. 16) that the court of appeals' conclusion finds support in the committee report on the 1988 amendment, which provides:

> It is intended that culpable conduct that is not coercive or "misleading conduct" be prosecuted under 18 U.S.C. 1512(b), rather than under the [omnibus] clause of 18 U.S.C. 1503. [The amendment], therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in such prosecutions being brought under 18 U.S.C. 1512(b).

H.R. Rep. No. 169, 100th Cong., 1st Sess. 12 (1987) (footnote omitted). That language expresses an intent that cases of "corrupt persuasion" could and should thenceforth be brought under Section 1512(b). Even as to such cases, it is doubtful that an expression of intent in a committee report on an amendment to one statute could affect the substantive scope of the criminal prohibition in another statute, which remained unchanged. The most reasonable reading of the report is thus as a communication from Congress to the Executive Branch concerning how future prosecutions should be brought, not as an attempt to amend Section 1503 by means of a committee report. Cf. *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 616-617 (1991). In any event, the committee report, like the amendment to which it was attached, addresses only cases of "corrupt persuasion," and it thus has no effect on cases like this that involve lying to prospective witnesses with the intent that the false information be communicated to the grand jury. The prohibition of such conduct in the omnibus clause of Section 1503 was not affected by Congress's action in 1988.

C. Neither The Fifth Amendment Nor The Rule Of Lenity Supports The Court Of Appeals' Holding

The court of appeals also briefly appealed to what it viewed as Fifth Amendment concerns that would be raised by "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." Pet. App. 24a. Had respondent invoked his Fifth Amendment privilege and refused to speak with the FBI agents, his conduct would no doubt be constitutionally protected. Although the Fifth Amendment protects an individual's right to remain silent, it does not protect his right to obstruct grand jury proceedings through calculated false statements. See, *e.g.*, *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) ("A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity

knowingly and willfully answer with a falsehood."); *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1049-1050 (5th Cir. 1994) (en banc). Accordingly, Fifth Amendment concerns do not support the court of appeals' limitation of the scope of Section 1503.

Nor does the rule of lenity, upon which the court of appeals also relied, see Pet. App. 24a-25a, support its holding in this case. As this Court has repeatedly cautioned, "[t]hat maxim of construction is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Staples* v. *United States*, 114 S. Ct. 1793, 1804 n.17 (1994) (internal quotation marks and brackets omitted). The broad language of the omnibus clause of Section 1503 leaves no room for ambiguity concerning any issue in this case. Accordingly, the rule of lenity has no application here.

II. SECTION 2232(c) PROHIBITED THE DISCLOSURE OF THE WIRETAP APPLICATION IN THIS CASE

Section 2232(c) of Title 18 protects the integrity of wiretaps that have been sought or authorized. It provides, in relevant part:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

The statute requires proof of three elements. First, there is a knowledge element: "knowledge that a

Federal investigative * * * officer has been authorized or has applied for authorization * * * to intercept a wire * * * communication." Second, there is an intent element: the government must prove that the defendant disclosed information "in order to obstruct, impede, or prevent such interception." Third, there is the physical act of attempted disclosure: "gives notice or attempts to give notice of the possible interception." Contrary to the court of appeals' view, there is no requirement that a wiretap resulting from the application of which the defendant has knowledge must actually be in place when the defendant makes disclosure "of the possible interception."

1. The knowledge element of the offense is satisfied by showing that the defendant knew of either an authorization or an application for authorization to intercept communications. The government's theory in this case was that respondent knew of and divulged information regarding an application to intercept conversations in which Chapman was named as a potential interceptee.

The evidence clearly established the knowledge element. Judge Peckham testified that, because he "feared that Chapman might be going to use the judge's prestige of his office in the furtherance of Chapman's interest," 7 Tr. 922, he informed respondent that "in the course of a wiretap application that the name Abie Chapman had come up," 7 Tr. 921. As respondent himself later explained to Solomon, he "knew" the FBI was wiretapping Chapman because Judge Peckham had told him that "the F.B.I.'s up there getting * * * a * * * wire tap order on [Chapman]." J.A. 7. Respondent also confirmed the same fact to his nephew, who conveyed respondent's information about the wiretap to Chapman. Respondent's nephew testified that when respondent told him

about the wiretap, respondent "did say that he had overheard at work about the possibility of [Chapman's] phone being wiretapped." 5 Tr

2. The dispute in this case centers on the intent element of the offense. That element requires proof that the defendant disclosed or attempted to disclose information about either an application or authorization to intercept telephone communications "in order to obstruct, impede, or prevent such interception." In our view, that means that the defendant must have acted with the purpose of obstructing any interception that may have resulted from the government's application. It does not require that the interception in fact be occurring at the time the defendant makes his disclosure.

a. The court of appeals believed that the term "such interception" in the phrase "in order to obstruct * * * such interception" precluded a conviction in this case. See Pet. App. 8a-9a. As the court of appeals explained it, "no matter what 'concrete action' a defendant may take, if no wiretap exists or is currently authorized and if there is no pending application, there is no way that the defendant can obstruct or attempt to obstruct the possible interception of a wiretap." *Id.* at 14a-15a. Therefore, according to the court, "because the wiretap had expired at the time [respondent] acted, no violation of section 2232(c) occurred." *Id.* at 15a.

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[6] The application did not in fact propose to tap Chapman's telephone, although Chapman was named as an intended interceptee of the wiretap for which application was made. See Pet. App. 5a. The court of appeals attributed no significance to the fact that a wiretap was not proposed for Chapman's own telephone, and nothing in the statute suggests that anything turns on that fact.

The court of appeals erred in interpreting the term "such interception" to preclude conviction of a defendant for disclosing a wiretap that had already expired by the time he made the disclosure. Nothing in the statutory language suggests that result. The words "such interception" are the object of the phrase "in order to obstruct." That phrase, in turn, identifies the specific intent with which the defendant must have acted and the object that the defendant sought to attain.[7] A defendant can intend to obstruct a wiretap that is not in operation, or even a wiretap that was never authorized. So long as the defendant acted with the object of obstruction, the intent element of the statute, as written by Congress, is satisfied.

Indeed, the fact that the wiretap—unbeknownst to the defendant—was not in operation or had never been authorized is generally of no relevance in determining whether the defendant acted "in order to obstruct * * * such interception." Section 2232(c) prohibits disclosure of information learned from a wiretap application, as well as information learned from a wiretap authorization order.[8] An individual, like respondent, who learned of a wiretap application would ordinarily have no way of knowing whether

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[7] A leading dictionary defines "in order to" as "for the purpose of." *Webster's Third New International Dictionary* 1588 (1986). "Purpose" is defined as "something that one sets before himself as an object to be attained." *Id.* at 1847.

[8] Cf. *United States* v. *Zemek*, 634 F.2d 1159, 1176-1177 (9th Cir. 1980) (in prosecution for obstruction of a criminal investigation under 18 U.S.C. 1510, investigation need not be taking place concurrently with proscribed acts), cert. denied, 450 U.S. 916, 985, and 452 U.S. 905 (1981).

or when the application had been initially approved or when the interception had begun. So long as he intended to bring about the forbidden result—*i.e.*, so long as he acted "in order to obstruct * * * such interception"—his state of mind satisfied the intent element of the statute.

That result follows directly from this Court's decision in *United States* v. *Russell*, 255 U.S. 138 (1921). In *Russell*, the defendant was indicted for an "endeavor" to influence a juror, in violation of the statutory predecessor to Section 1503. The indictment, however, did not allege that the person who was the object of the defendant's approach had yet been selected or sworn as a juror when the defendant made his approach. 255 U.S. at 142, 143. This Court held that fact immaterial, explaining that the defendant "had some purpose in his approach" and the word "endeavor" describes "any effort or essay to accomplish the evil purpose that the section was enacted to prevent." *Ibid.* The phrase "in order to" in Section 2232(c) has much the same meaning as "endeavor" in Section 1503: both describe the intent of the defendant, not the result that is achieved. Accordingly, just as in *Russell*, the defendant can be found to have acted with the requisite intent even if he could not achieve his goal.[9] See also *Osborn* v. *United States*, 385 U.S. 323, 332-333 (1966).

[9] The court of appeals attempted to distinguish *Russell*, arguing that this case is analogous to what would have occurred in *Russell* "had there been no trial contemplated at all, and thus no possible jurors to attempt to influence." Pet. App. 14a. In such a case, according to the court, "it would have been legally impossible for the defendant to have committed a statutory violation." *Ibid.* But the hypothesized case would not have constituted a violation of Section 1503, because an independent element of a Section 1503 violation is that there be a pending proceeding, and that element would not be satisfied. The analogous case under Section 2232(c) would be if there had been no wiretap application at all, and the defendant simply mistook some other pleading for a wiretap application. In that case, the defendant could not be convicted of a violation of Section 2232(c), because he would not have had "knowledge that a Federal * * * officer * * * applied for authorization * * * to intercept a wire * * * communication."

The legislative history makes clear that Section 2232(c) does not require that an authorization be in effect or an application pending at the time the defendant makes his disclosure. The Senate report explained that the statute requires proof that "the defendant have knowledge that the Federal law enforcement or investigative officer has been authorized or has applied for an interception order." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986). The report went on to state that the authorization need not be in effect at the time the disclosure is made: "The defendant must engage in conduct of giving notice of the possible interception to any person who *was or is* the target of the interception." *Ibid.* (emphasis added). The report also stated that "[t]he offense also includes an attempt to engage in the offense," *ibid.*, indicating that a prosecution may be brought even when the disclosure did not or could not have actually interfered with the interception. The House report included substantially identical language. H.R. Rep. No. 647, 99th Cong., 2d Sess. 60-61 (1986).

The jury instructions in this case accurately described the intent requirement of Section 2232(c). The court instructed that "it is not necessary that at

the time the disclosures were made the interception was still going on." J.A. 120. Instead, the court instructed, the jury must determine whether or not it was respondent's "intent, by giving notice or attempting to give notice, to in some way impede or interfere with the interceptions that have been applied for." *Ibid.*

b. The absence of actual interception under a wiretap is relevant in one sense under Section 2232(c). If the defendant *knew* at the time he made the disclosure that the wiretap had never been authorized or that it had been terminated, that knowledge would constitute compelling evidence that he did not act "in order to obstruct * * * such interception." That is because such knowledge would negate the intent element of the offense; an individual ordinarily cannot be said to have acted in order to accomplish an end that he himself knows is impossible.

In this case, however, there was no reason to believe that respondent thought that no wiretap was authorized or in place when he alerted Chapman to the possible interception. Although respondent made his disclosure in February 1988—five months after learning from Judge Peckham of the application to intercept Chapman's communications—that does not suggest that he knew that the wiretap had expired by the time he made his disclosure. There is no absolute temporal limit—and certainly no five-month limit—on how long an interception may continue under federal law. Under 18 U.S.C. 2518(5), "[n]o [wiretap] order * * * may authorize * * * the interception of any wire * * * communication for any period longer than * * * thirty days." The statute also provides, however, that "[e]xtensions of a[] [wiretap] order may be granted" if a new application is submitted and the court makes the necessary findings. *Ibid.* See *United States* v. *Giordano*, 416 U.S. 505, 530-533 (1974). Although "[t]he period of extension [pursuant to a given extension application] shall be no longer than * * * thirty days," 18 U.S.C. 2518(5), there is no limit on how many successive applications may be submitted or how many extensions may be granted.[10]

In any event, the evidence presented to the jury in this case made it quite clear that respondent believed that the interception was continuing when he made his disclosure. On February 6, 1988, respondent called his nephew and told him to come to his house "right now, it's very, very urgent." Tape N-504. He told his nephew that "I need to get a message to [Chapman], who was just here a minute ago. * * * But I can't talk over the phone." *Ibid.* That alone suggests that he believed that the inter-

[10] It is not uncommon for the government to obtain several extensions to a wiretap order in a complex criminal case. For example, in *United States* v. *Ojeda Rios*, 495 U.S. 257, 260-261 (1990), one wiretap was authorized on May 11, 1984, and continually extended until October 10, 1984; a wiretap on a different telephone was authorized on November 1, 1984, and extended until May 30, 1985; two other wiretaps lasted for an initial period plus two extensions; and one wiretap lasted only for a single month, with no extensions. See also, *e.g.*, *United States* v. *Gallo*, 863 F.2d 185, 191-193 (2d Cir. 1988) (wiretap authorized in November 1982 and extended through August 1983), cert. denied, 489 U.S. 1083 (1989); *United States* v. *Williams*, 737 F.2d 594, 600 (7th Cir. 1984) (wiretap authorized in early 1979 and extended into 1980), cert. denied, 470 U.S. 1003 (1985); *United States* v. *Poeta*, 455 F.2d 117, 119 (2d Cir.) (wiretap authorized in March 1970 and extended through June 1970), cert. denied, 406 U.S. 948 (1972).

ception was continuing. Indeed, respondent believed that the authorization had been granted and extended until *after* the date he made the disclosure: as he stated to Solomon in a conversation secretly taped on May 17, more than three months after the disclosure, "[o]h yeah the phone's definitely tapped. * * * Absolutely." J.A. 21.

Based on those facts, the jury reasonably concluded that respondent acted "in order to obstruct * * * such interception." As it turned out, the original authorization of which respondent had knowledge resulted in a wiretap order that expired after 30 days, on May 21, 1987, although it was later reauthorized and extended further with respect to the same telephone number and an overlapping, though changing, list of interceptees. See Pet. App. 5a. Those facts, however, are of no significance, for there is no evidence that respondent *knew* that the wiretap had ever expired (or that it had ever been reauthorized).[11] In the absence of such knowledge, the termination, reauthorization, and extension of the interception order that in fact occurred in this case do not suggest that there was any error in the jury's finding that respondent acted "in order to obstruct * * * such interception."

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[11] This Court therefore need not reach the question whether the reauthorization and successive extension orders of the wiretap in this case should be regarded as extensions of the original wiretap order, since they involved the same telephone number and an overlapping, though changing, list of interceptees. Cf., *e.g.*, *United States* v. *Carson*, 969 F.2d 1480, 1487-1489 (3d Cir. 1992) (discussing whether successive interception orders were extensions of original interception order, for purposes of "sealing" requirement of 18 U.S.C. 2518(8)(a)).

3. The third, physical act element of the statute requires proof that the defendant "g[a]ve[] notice or attempt[ed] to give notice of the possible interception." The government proved that element at trial by showing that respondent informed Chapman, through respondent's nephew, Steve Aguilar, that Chapman's telephone conversations were being intercepted.

a. The evidence was more than sufficient to support the jury's conclusion that respondent gave the requisite notice. Steve Aguilar testified at trial that, after he arrived at respondent's house in response to respondent's telephone call, respondent told him that respondent "had overheard at work about the possibility of [Chapman's] phone being wiretapped." 5 Tr. 825. Steve drove to Chapman's house and informed Chapman of that fact. *Ibid.* Later that day, respondent again called Steve and asked him to come to his house. Replying to respondent's questions, Steve told him that he had conveyed the information to Chapman. 5 Tr. 826-827.

There was substantial corroboration to show that respondent had conveyed the information to Chapman. After February 6, 1988, Chapman used an alias ("Dr. Green") when he called respondent. See, *e.g.*, Tape O-1449, O-2022, O-3092. On February 29, 1988, Chapman told Tham that someone "very big" had told him that his telephone was tapped. Tape M-1189. Finally respondent himself explained to Solomon in one of the secretly taped conversations precisely how he instructed his nephew to tell Chapman about the wiretap. Respondent said,

> I told my nephew and I said I want you to tell him not over the phone. You get to his house and tell him. He says I'm gonna go see him

> tonight. So he went and saw him that night and told him and then the next time I talked to Abe he called me from a pay phone. He only calls me from pay phones.

J.A. 21-22.

b. The court of appeals may also have believed that respondent's conduct did not satisfy the disclosure element of the offense, on the ground that there was no "possible interception" at the time the disclosure was made. See Pet. App. 12a-13a. The court stated that, because "the element of 'possible interception' must be met[,] * * * the wiretap must be in existence or there must be a pending application or authorization." *Id.* at 13a.

The court of appeals' construction of the words "possible interception" conflicts with the plain language of the statute. The statute does not refer to a "pending application" but to an "application." And it does not refer to an "actual interception," or an "interception" *simpliciter*, but to a "possible interception." As ordinarily understood, the use of the term "possible" indicates that the government need *not* prove that the actual wiretap was in operation or that the authorization for a wiretap was pending at the time the disclosure was made. To the contrary, the term "possible" indicates that it is a crime to disclose a wiretap application, regardless of whether an actual wiretap was in operation. So long as the defendant believed it was "possible" that an operational wiretap resulted or would result from the application of which he had knowledge at the time he made the disclosure, the disclosure element is satisfied.

Any other interpretation of the term "possible" would result in an untenable interpretation of the

statute. One of the predicates for the application of the statute is the defendant's knowledge of a wiretap application. Since some wiretap applications may not be approved, a defendant who learns of an application may well be unaware of whether any interception was likely to or did occur. There is no basis in the statutory language to conclude that Congress intended that such a defendant can avoid conviction by proving that the application had in fact—and unbeknownst to him—been denied before he made his disclosure.

Indeed, if such a windfall defense were recognized, other defenses not discussed by the court of appeals presumably would have to be recognized as well. As the dissenting judges noted, see Pet. App. 27a, if the telephone line or the wiretap equipment was malfunctioning, the defendant would be able to escape conviction because no interception was therefore "possible." Similarly, if the interceptee had simply ceased using the telephone to be tapped, for reasons unrelated to the wiretap, a defendant who later disclosed the wiretap with the intent to obstruct the interception could not be convicted, since no interception would have been "possible." There is no reason to believe that Congress would have wanted to create such defenses to Section 2232(c). Yet such defenses would be a logical result of the court of appeals' interpretation.

4. The court of appeals suggested that the rule of lenity and First Amendment considerations support its interpretation. See Pet. App. 9a-10a, 11a-12a. As with the obstruction statute, resort to the rule of lenity is unnecessary because both the language and the intent of Section 2232(c) are unambiguous.

Nor does the construction of the statute we advocate raise a substantial First Amendment concern.

Under any construction, the statute limits some disclosure of information that could be of public interest. But the statute only prohibits disclosures made with the intent to impede or obstruct a possible interception. Where the disclosure is made with that intent—rather than an intent "to correct past government misconduct and to avert similar abuses of power in the future," by disclosing "politically-motivated wiretaps, such as those that occurred at the height of the civil rights movement," Pet. App. 11a-12a—the defendant can plainly be prosecuted under Section 2232(c). Moreover, it has long been settled that the government may prohibit individuals in a position of confidence, such as respondent, from disclosing confidential information that they receive in their official capacity. See, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 511 & n.6 (1980) (per curiam). Indeed, the grand jury secrecy requirement of Fed. R. Crim. P. 6(e) is based on essentially the same rationale as Section 2232(c), and it is enforceable through a criminal contempt sanction or, in an appropriate case, a prosecution for obstruction of justice. See, *e.g.*, *United States* v. *Jeter*, 775 F.2d 670, 678-679 (6th Cir. 1985) (rejecting argument that First Amendment provides defense to charge of obstructing justice by violating Rule 6(e)), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Howard*, 569 F.2d 1331, 1336 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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